Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000139-001 DT 07/25/2014

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

v.

CHRISTIAN MICHAEL PASCALE (001)

ANDREA A GUTIERREZ

LAURIE A HERMAN

PHX CITY MUNICIPAL COURT
PHX MUNICIPAL PRESIDING JUDGE
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 14008059–02.

Defendant-Appellant Christian Michael Pascale (Defendant) was convicted in Phoenix Municipal Court of underage drinking and driving. Defendant contends as follows: (1) The trial court erred in denying his Motion To Dismiss/Suppress, which alleged the State failed to preserve a second sample for his independent testing; (2) the State failed to present sufficient evidence to support the conviction; and (3) the trial court erred in not announcing its verdict in open court. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

June 3, 2012, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1); underage drinking and driving, A.R.S. § 4–244(34); and failure to control speed to avoid a collision, A.R.S. § 28–701(A). Prior to trial, Defendant filed a Motion To Dismiss/Suppress alleging the State failed to preserve a second sample of his blood for his independent testing. At that hearing on that motion, Officer Ricky Newberry testified he responded to the scene of a collision on June 4, 2012. (R.T. of Dec. 18, 2012, at 12–13, 15.) After investigating the situation, Officer Newberry placed Defendant under arrest at 1:30 a.m. (*Id.* at 33–34, 39, 62–63.)

Officer William Bennett testified he was working as the phlebotomist in the DUI van when officers brought Defendant to the van. (R.T. of Dec. 18, 2012, at 78–79, 93.) He read to Defendant the Admin Per Se/Implied Consent Affidavit, and Defendant agreed to the blood draw. (*Id.* at 94–96.) At 1:50 a.m., Officer Bennett drew two tubes of blood, each of which had approximately 5 milliliters. (*Id.* at 90, 96.) He then advised Defendant of his right to arrange for, and pay for, an independent chemical test. (*Id.* at 96–97.) He also explained Defendant could have one of the two tubes tested independently if he wanted. (*Id.* at 97.)

James Hoban testified he was a forensic scientist for the City of Phoenix Crime Lab. (R.T. of Dec. 18, 2012, at 135–36.) He analyzed a sample of Defendant's blood for the presence of alcohol, while another forensic scientist, Jon Copeland, analyzed for the presence of drugs. (*Id.* at 137–38.) Mr. Hoban said there were two tubes, both of which had 8 milliliters of blood. (*Id.* at 139.) For his two tests, he drew two samples of 100 micro liters each, leaving about 7.8 milliliters of blood in the tube. (*Id.* at 148.) The results of his testing showed a BAC of 0.012. (*Id.* at 149.) He testified Mr. Copeland used the second tube to obtain his sample for the drug testing. (*Id.* at 151–52.) He said Mr. Copeland used 500 micro liters for his test, which left about 7.5 milliliters for further analysis. (*Id.* at 152.) He said a person would need at least 1 milliliter of blood for further testing, so the two tubes with 7.8 milliliters and 7.5 milliliters both contained sufficient blood for further tests. (*Id.* at 152–54, 157.) He said that, because both tubes had been opened, if they were tested again, they would probably give a lower BAC reading, which would benefit Defendant. (*Id.* at 155–56.)

After hearing the testimony, the trial court took the matter under advisement. (R.T. of Dec. 18, 2012, at 182.) On December 24, 2012, the trial court denied Defendant's Motion. (Phoenix Municipal Court Record of Proceedings at 4; R.T. of Jan. 3, 2013, at 5.)

The trial court held trial in this matter on January 3, 2013. Officer Ricky Newberry testified he responded to the scene of a collision on June 4, 2012. (R.T. of Jan. 3, 2013, at 55.) He spoke to Defendant, who was 18 years old at the time. (*Id.* at 55, 60.) He smelled a "very slight faint odor of alcohol" coming from Defendant. (*Id.* at 61.) He had Defendant perform the HGN test, and observed two of the six cues. (*Id.* at 61, 63.) He had Defendant do the walk-and-turn test, where he observed one cue, and the one-leg-stand test, where he observed two cues, which he considered failing the test. (*Id.* at 63–65, 68.) Officer Bennett testified he drew two tubes of Defendant's blood. (R.T. of Jan. 3, 2013, at 30–33.) James Hoban testified he analyzed a sample of Defendant's blood for the presence of alcohol and determined Defendant had a BAC of 0.012. (*Id.* at 81, 83–84.) With the margin of error, that would mean a BAC of between 0.007 and 0.017, either of which would indicate alcohol in the person's body. (*Id.* at 100.)

After the State rested, Defendant's attorney made a motion for judgment of acquittal, which the trial court denied. (R.T. of Jan. 3, 2013, at 149.) Defendant then presented his case and the State presented rebuttal. (*Id.* at 150, 202.) After the close of testimony, the attorneys argued whether the State had presented sufficient evidence, and the trial court took that issue under advisement. (*Id.* at 259.) The trial court said it would rule by "next Friday" and have its bailiff call both attorneys. (*Id.* at 260.) Defendant's attorney made no objection to that procedure. (*Id.*) On January 11, 2013, the court clerk made an entry showing the trial court found Defendant guilty. (Phoenix Municipal Court Record of Proceedings at 5–6.)

On March 7, 2013, the trial court held sentencing and stated it found Defendant guilty of underage drinking and driving. (R.T. of Mar. 7, 2013, at 9.) The trial court then imposed sentence. (*Id.* at 22–29.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Did the trial court abuse its discretion in ruling the State was not required to obtain a second sample of Defendant's blood for Defendant's testing.*

Defendant contends the trial court erred in ruling the State was not required to obtain a second sample of his blood for his own testing. In *Montano v. Superior Ct.*, 149 Ariz. 385, 719 P.2d 271 (1986), the court held the state had no obligation to gather evidence for a defendant:

> The state has no obligation, apart from *Baca*, to actually gather evidence for a suspect, but in the absence of the implied consent law it must provide suspects a fair chance to gather evidence by informing them of their right to testing.

149 Ariz. at 391, 719 P.2d at 277. In *Baca v. Smith*, 124 Ariz. 353, 604 P.2d 617 (1979), which was a ***breath*** test case, the court held the state was required to preserve a second sample for a defendant when the state's testing of its sample completely destroyed that sample:

> We conclude after considering these and other cases that the right to test incriminating evidence where the evidence is completely destroyed by testing becomes all the more important because the defense has little or no recourse to alternate scientific means of contesting the test results, and, therefore, when requested, the police must take and preserve a separate sample for the suspect by means of a field collection unit.

124 Ariz. at 356, 604 P.2d at 620. Thus, the right to a "second sample" only existed when the State took an actual sample of the defendant's ***breath*** and tested that sample, and when the testing destroyed that ***breath*** sample.

In *State v. Kemp*, 168 Ariz. 334, 813 P.2d 315 (1991), the Arizona Supreme Court held, however, the rule for ***breath*** test cases (such as *Baca*) did not apply in ***blood*** test cases:

> The State in this case requests that we reexamine the rules established by this line of cases, arguing that *California v. Trombetta* has overruled our decisions requiring that a defendant be given a ***breath*** sample. We decline the State's invitation to reexamine the rules in ***breath*** testing cases because this is not a ***breath*** testing case; rather, it is a case involving ***blood*** testing.
>
> Having declined the State's invitation to reexamine the rule that a DWI defendant must be given a ***breath*** sample for independent testing, we must now determine whether the rule in ***breath*** testing cases should also apply in ***blood*** testing cases. We believe that legitimate distinctions exist between ***breath*** testing and ***blood*** testing and, therefore, that the rule for ***breath*** testing cases need not be extended to ***blood*** testing cases.
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> . . . .
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> . . . Thus, the rationale used in *Montano* is not present in a ***blood*** testing case because ***blood,*** when properly stored and maintained, is still available for testing by the defendant at the time of trial. This availability lessens the need for law enforcement officials to advise a DWI suspect that he may obtain, for independent testing, a portion of the ***blood*** sample being tested by the law enforcement agency.

> We believe that the due process clause, as applied in DWI cases, can legitimately have two standards—one for ***breath*** testing cases and one for ***blood*** testing cases. Thus, we hold that law enforcement officers, when obtaining a ***blood*** sample pursuant to A.R.S. § 28–692(M), need not advise the suspect of his right to obtain a portion of the same sample for independent testing, at least when the sample taken by law enforcement officers ***will still be available for testing by the defendant at the time of trial.***

168 Ariz. at 335–37, 813 P.2d at 316–18 (emphasis added; citations omitted). In 1992, the Arizona Legislature enacted a statute doing away with the State's obligation to preserve a second ***breath*** sample as long as the State administered duplicate ***breath*** tests:

> If a law enforcement officer administers a duplicate ***breath*** test and the person tested is given a reasonable opportunity to arrange for an additional test pursuant to subsection C of this section, a sample of the person's ***breath*** does not have to be collected or preserved.

A.R.S. § 28–1388(B) (emphasis added). In *Moss v. Superior Court*, 175 Ariz. 348, 857 P.2d 400 (Ct. App. 1993), the Arizona Court of Appeals upheld the constitutionality of that statute:

> Given the reliability and accuracy of replicate testing with an Intoxilyzer 5000, we do not believe that due process or fundamental fairness requires the state to provide defendants with ***breath*** samples.

175 Ariz. at 352, 857 P.2d at 404; *accord, State v. Bolan*, 187 Ariz. 159, 161–62, 927 P.2d 819, 821–22 (Ct. App. 1996); *see also State ex rel. Dean v. City Court of Tucson*, 163 Ariz. 510, 514–15, 789 P.2d 180, 184–85 (1990). Thus, there no longer exists in Arizona any requirement that the police preserve a second sample for a defendant for either a breath test or a blood test.

In the present case, the State presented evidence that one tube still contained 7.8 milliliters of blood and the other contained 7.5 milliliters of blood, both of which were sufficient for further tests. (R.T. of Dec. 18, 2012, at 148, 152–54, 157.) The trial court therefore did not abuse its discretion in ruling that the State had satisfied the requirements imposed by *Kemp.*

Defendant appears to be intermixing the concepts of (1) a defendant's Sixth Amendment right to confront and attack the State's evidence and thereby negate the State's proof, and (2) a defendant's Fourteenth Amendment due process right to gather affirmative evidence to provide proof for a possible defense. Examples of cases discussing the defendant's right to confront and attack the State's evidence are *Baca* and *Kemp* discussed above.

For the defendant's Fourteenth Amendment due process right to gather affirmative evidence to prove a possible defense, the United States Supreme Court has held "the Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-sample tests at trial." *California v. Trombetta*, 467 U.S. 479, 491 (1984), *accord, Moss*, 175 Ariz. at 352, 857 P.2d at 404. As noted above, the Arizona Supreme Court has stated "[t]he state has no obligation . . . to actually gather evidence

for a suspect . . . ." *Montano*, 149 Ariz. at 391, 719 P.2d at 277; *accord, State v. Ramos*, 155 Ariz. 153, 154, 745 P.2d 601, 602 (Ct. App. 1987). Instead, the Arizona Legislature has provided a defendant with the opportunity and means of obtaining affirmative proof to support a possible defense by granting to a defendant the right to obtain an independent chemical blood test. A.R.S. § 28–1388(C). Officer Bennett advised Defendant of his right to arrange for, and pay for, an independent chemical test. (R.T. of Dec. 18, 2012, at 96–97.) The State therefore was not required to preserve an un-tampered sample of Defendant's blood for his testing, thus the trial court did not abuse its discretion in denying Defendant's Motion To Dismiss/Suppress.

B. *Did the State present sufficient evidence to support the conviction.*

Defendant contends the State did not present sufficient evidence to support the conviction. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

> We review a sufficiency of the evidence claim by determining "whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict." Substantial evidence is proof that "reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt." We resolve any conflicting evidence "in favor of sustaining the verdict."

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the trier-of-fact, but whether there is a complete absence of probative facts to support its conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

In the present matter, the State presented the following items of evidence: (1) Defendant had a slight odor of alcohol coming from him; (2) Defendant's performance on the field sobriety tests was consistent with someone under the influence of alcohol; and (3) testing showed Defendant had a BAC of 0.012. Thus, there was not "a complete absence of probative facts to support its conclusion." The evidence was therefore sufficient to support the conviction.

Defendant contends, however, the testing showed Defendant's 0.012 BAC was 1½ hours after he was driving, thus there was no evidence he had alcohol in his system while he was driving. Arizona law makes no distinction between direct and circumstantial evidence. *State v. Bible*, 175 Ariz. 549, 560 & n.1, 858 P.2d 1152, 1163 & n.1 (1993) (court stated guilty verdicts were primarily based on circumstantial evidence, but noted there was no distinction between probative value of direct and circumstantial evidence); *State v. Harvill*, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970) (opinion of court was that probative value of direct and circumstantial evidence was intrinsically similar; therefore, there was no logically sound reason for drawing distinction in weight to be assigned each). In the present matter, there was no evidence that Defendant had anything to drink during the period from when he was driving and when the officers drew his blood sample. As such, that was circumstantial evidence that the 0.012 BAC was the result of alcohol Defendant had consumed prior to the time of the collision.

C. *Did the trial court err in finding Defendant guilty prior to the court hearing.*

Defendant contends the trial court erred in not announcing in open court its determination that Defendant was guilty. The record shows, however, the trial court did announce in open court that it had determined Defendant was guilty. (R.T. of Mar. 7, 2013, at 9.) Thus, the trial court did not commit any error.

Defendant contends, however, the trial court erred in determining prior to the court hearing that Defendant was guilty. Defendant has cited no authority for the proposition that, when there is a trial to the court, the trial court is precluded from making a determination in its own mind whether or not the defendant is guilty until such time as the trial court is in the courtroom with all parties present.

Defendant seems to contend that the error was not that the trial court made a determination in its own mind that Defendant was guilty, the error was that the trial court so advised the parties before it held a hearing when all parties were present. As noted above, on January 3, 2013, the trial court took the matter under advisement, and on January 11, 2013, the court clerk made an entry showing the trial court found Defendant guilty. (Phoenix Municipal Court Record of Proceedings at 5–6.) The reason why the trial court made the guilty/not guilty determination prior to the date for the sentencing hearing was the prosecutor needed to advise the victims of the verdict so they could determine whether to make a claim for restitution at the time of sentencing. (R.T. of Jan. 3, 2013, at 260.) The trial court told the parties it would "have a decision no later than next Friday," and neither Defendant nor his attorney made any objection. (*Id.*) Thus, even assuming what the trial court did was error, Defendant waived any error.

III. CONCLUSION.

Based on the foregoing, this Court concludes (1) the State was not required to preserve a second sample for Defendant's independent testing; (2) the State presented sufficient evidence to support the conviction; and (3) the trial court announced its verdict in open court.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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